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Against Dictionaries: Using Analogical Reasoning to Achieve a More Restrained Textualism

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AGAINST DICTIONARIES: USING ANALOGICAL REASONING TO ACHIEVE A MORE RESTRAINED TEXTUALISM

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This Note argues that new textualists should abandon dictionaries as a source for legal interpretation. Textualists believe in restricting judges to the intent discernible from the words of a statute and contend that legislative history is unacceptable as a source of this intention. Both of these sentiments lead textualists to dictionaries as the intuitively correct solution for ambiguities in a text. The author argues, however, that dictionaries by their very nature cannot help discern between reasonable definitions at the margins of meaning. The use of dictionaries in these situations allows for a sham formalism, unrestrictive in result and unrevealing of a judge's extra-legal considerations.

As a replacement for dictionaries, this Note suggests a classic method of legal thought: analogical reasoning. The author proposes that a judge faced with an ambiguous yet basic term should develop analogous phrases for the term's possible usages. In reasoning among these analogies a judge would develop and articulate principles, revealing her legal and extra-legal considerations. The very transparency of the process would result in a restrictiveness based on the judge's need to meet her peer's process values.

"I have to have a constitutional argument? Can't I just use common sense and reason?"

—Justice Antonin Scalia[1]

The "new textualism," as it is frequently called,[2] is a method of statutory interpretation whereby a judge reads a statute and asks how the ordinary reader would interpret the text.[3] New textualists argue that the words of the statute, not the lawmaker's intentions,

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1. Justice Antonin Scalia, Question and Answer Session at the University of Michigan Law School (Nov. 17, 2004) (on file with the University of Michigan Journal of Law Reform). The response was given to a question concerning the constitutional argument of Scalia's opinion granting a stay of vote counting in *Bush v. Gore*, specifically his view that further recounts would cause the public to question the efficacy of the process. *See* Bush v. Gore, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring).

2. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (tracing and critiquing Justice Scalia's "new textualism" as a response to what Scalia considers the Court's over-reliance on legislative history).

3. *Id.* at 623.

should be dispositive. The most notable new textualist,[4] Justice Antonin Scalia, says, "[i]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated."[5] Considering the use of legislative history to be a cryptic form of interpretation, Scalia likens it to Emperor Nero posting edicts so high on the pillars that citizens could not read them.[6]

Instead new textualists believe that in interpreting the language of laws, the ordinary meaning of a word must be understood within the context of the surrounding words and laws.[7] New textualism is far more complex than simply a "plain meaning" rule in this respect because it does not limit interpretation to the four corners of the document.[8] New textualists believe contextual sources do not extend—as intentionalists believe—to items such as legislative history or committee reports.[9] While intentionalists emphasize the importance of discerning a legislative intent, textualists believe this intent exists not in floor statements and committee reports, but rather in a "sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."[10] In short, a new textualist judge uses what this Note will call a "contextual toolbox" which includes "dictionaries and grammar books, the whole statute, analogous provisions in other statutes, canons of construction, and the common sense God gave us."[11] The last tool, common sense, is important because it shows flexibility in new textualism to depart, in some real sense, from citable sources.

This Note does not criticize this contextual toolbox as a whole, nor does it weigh the restrictions of textualism versus intentionalism.[12] Rather, this Note assumes the validity of "new textualism" as a judicially restraining method of interpretation, along with the inva-

4. *Id.*

5. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Amy Gutmann ed., 1997).

6. *Id.*

7. Smith v. United States, 508 U.S. 223, 244–45 (1993) (Scalia, J., dissenting).

8. *See* Eskridge, *supra* note 2, at 621 ("[T]he meaning of a text critically depends upon its surrounding context.").

9. Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 356 n.22 (1994).

10. SCALIA, *supra* note 5, at 17.

11. ESKRIDGE, *supra* note 2, at 669.

12. For the purposes of this paper, I will accept Justice Scalia's argument that legislative history is little more than an excuse for judicial lawmaking while strict adherence limits a judge's power. *See* Rickie Sonpal, Note, *Old Dictionaries and New Textualists*, 71 FORDHAM L. REV. 2177, 2196 (2003).

lidity of legislative history as a contextual source. It argues only that the elimination of dictionaries as a contextual resource would add to the judicially restrictive goals of the textualist doctrine. A new textualism definition need only be upheld on the context of the phrase in question, the intention of the statute, the appropriate canons of construction, the *corpus juris* and "the common sense God gave us." By turning to the dictionary, judges either blunt their linguistic intuitions about correct usage or mask their biases through formalist semantics, primarily because they already *know* the meaning or meanings of the words they look up.

A completely unbiased judiciary is a chimera at best, if even desirable. However, transparency of reasoning forces "activist" judges to truly justify subjective decisions to their peers and community. A codification of word definitions—the dictionary—would seem to be the most restrictive way to solve word ambiguities in statutory interpretations. However, in hard cases codification can be the least restrictive method of all because it promotes formalism.[13] While formalism is not devastating to an argument, it often takes the place of difficult reasoning. In many of the cases to follow, had the courts in question eliminated dictionary analysis and used the already known skill of analogical reasoning to find ordinary usage, they may have arrived at more transparent and less impeachable judgments.

Part I shows the ways in which judges use dictionaries to interpret statutes, the increasing frequency with which judges are turning to such methods, and concludes with a short defense of the practice. Part II then summarizes the various criticisms of the Dictionary Method. Most importantly, the Dictionary Method encourages an acontextual interpretation of a word, thereby blunting linguistic intuitions about correct usage while masking biases. Part III demonstrates, through a Wittgenstein-esque word game, a technique of defining common words relying solely on context and purpose within a framework of analogical reasoning. Part III then summarizes recent theories on analogical reasoning. Using the commonalities among these theories and the linguistic philosophy of Part II, Part III then suggests a new method of defining ambiguous terms. Having suggested a new method that yields no citable sources, Part IV argues that analogical reasoning is the foremost process of decision making within a judge's "interpretive

13. *See* Cass R. Sunstein, *Commentary: On Analogical Reasoning*, 106 HARV. L. REV. 741, 756 (1993).

community."[14] Further, within the new textualist community, "common sense" is an acceptable internal source. Part IV concludes that, standing alone, constraints of process and source should be sufficiently restraining on judges and acceptable within the legal community.

I. JUDICIAL USE OF DICTIONARIES

A. Frequency of Use

The Supreme Court rarely used the dictionary prior to the 1860's.[15] From the 1860's to 1900 the dictionary was used in forty-two opinions to define fifty-eight words.[16] From 1900 until 1970 the dictionary was used in 100 opinions to define 141 terms.[17] In the 1970's dictionary use increased to forty opinions defining fifty terms.[18] The 1980's saw an even more marked jump to 100 opinions, defining 125 terms.[19] From 1990 to 1998 the court cited the dictionary almost 180 times to define more than 220 terms.[20] As evidence of this pattern of ever-increasing use, the court has used the dictionary at least 146 times from 1994 to 2002.[21] The 1990's actually generated about half of all the opinions in the Court's history in which dictionaries were used.[22] In other words, while the dictionary has long been a tool of judicial interpretation for the Supreme Court, its rise in usage from the 1970's onward has been absolutely dramatic.[23]

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14. *See* Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 745 (1982).

15. Samuel A. Thumma & Jeffrey Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 254 (1999). The dictionary was used by the Supreme Court three times prior to 1864. *Id.* at 248.

16. *Id.* at 248–49.

17. *Id.* at 249–52.

18. *Id.* at 252.

19. *Id.* at 253–54. *See* Lawrence Solan, *When Judges Use the Dictionary*, AMERICAN SPEECH, Spring 1993, at 50. From 1986 to 1991 the Court used a dictionary in ninety cases or 11 percent of the 804 total cases before the court during that period. *Id.* at 51. Scalia was the leader with eighteen opinions using the dictionary. *Id.*

20. Thumma & Kirchmeier, *supra* note 15, at 253–54.

21. Craig Hoffman, *Parse the Sentence First: Curbing the Urge to Resort to the Dictionary When Interpreting Legal Texts*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 401, 415 (2002).

22. John J. Hasko, *Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions*, 94 LAW LIBR. J. 427, 432 (2002); Samuel A. Thumma & Jeffrey Kirchmeier, *The Lexicon Remains a Fortress: An Update*, 5 GREEN BAG 2D 51, 52 (2001).

23. *See* Thumma & Kirchmeier, *supra* note 15, at 250. This article exhaustively documents every single Supreme Court use of the dictionary from the Court's inception through 1998. This includes every word or words the Court used the dictionary to define. *Id.* at 248–

Supreme Court commentators have extensively documented the increased use of dictionaries. Most blame Justice Scalia for this dramatic increase.[24] His tenure has not only seen a large reliance on the dictionary to support the new textualist theory of interpretation, but has seen a nearly complete abandonment of another contextual source—legislative history.[25] Legal opinions are built on citations to prior authority such as case law.[26] When Justices turn to grammatical interpretation of statutes, the desire to cite authority does not dissipate. Therefore, opinions on statutory interpretation frequently cite to legislative history, the dictionary or other seemingly neutral sources as justification.[27] However, Justice Scalia has refused to join any opinion which cites legislative history.[28] Following the arrival of Justice Thomas, textualist clout doubled, forcing Justices who need the votes of Justices Scalia and Thomas to find sources beyond legislative history. The dictionary benefited from this search.[29]

Justice Scalia leads by example. As of the end of the 1997–98 term, he had used the dictionary more times than any justice in history: fifty opinions, defining sixty-five terms.[30] In comparison, Justice Brennan was the previous career leader, citing the dictionary in thirty-one opinions.[31] Since that time, Justices Scalia and Thomas have continued along a steady path of dictionary use.[32]

B. Methods of Dictionary Use

The Court uses the dictionary for two general purposes, designated by one commentator as "verification" and "definition."[33] The Definition Method is simply using the dictionary for its most commonly assumed purpose: to define a word whose meaning one

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62 nn.169–82. The authors repeat this exhaustive documentation for 1998 to 2000. Thumma & Kirchmeier, *supra* note 22, at 432–34 nn.26–43.

24. *See* Hasko, *supra* note 22, at 432; Solan, *supra* note 19, at 50–51.

25. Eskridge, *supra* note 2, at 642–43.

26. For a discussion of this fairly common principle, *see* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

27. *See* Solan, *supra* note 19, at 55–56.

28. *See* Merrill, *supra* note 9, at 365.

29. *Id.*

30. Thumma & Kirchmeier, *supra* note 15, at 261.

31. *Id.*

32. Thumma & Kirchmeier, *supra* note 22, at 52.

33. *See* Hoffman, *supra* note 21, at 415.

does not know.[34] The Verification Method involves using the dictionary to verify the ordinary usage or meaning the Court is trying to assign.[35]

1. Definition Method—The Definition Method comprises a small percentage of the Court's dictionary use and is considered fairly uncontroversial when used to define contemporary words with contemporary sources.[36] From 1994 to 2002, the Court used the Definition Method in twenty-two opinions, compared to the Verification Method in 124 opinions.[37] Usually the Court uses a specialized dictionary to define technical terms.[38]

A subset of the Definition Method occurs when the Court tries to define a word's usage at the time a statute was written.[39] There is an intuitive comfort in using an old dictionary to define a word for which the usage has changed over time. However, linguists and legal commentators have pointed out problems with this reliance on old dictionaries.[40] As will be discussed below, lexicography does not always encompass a full range of usages—sometimes accidentally.[41]

2. Verification Method—Verification is the more frequent and more criticized method of dictionary use; this Note focuses on this method. To a layman, it may seem inexplicable why Supreme Court Justices would need to look up such words as "any," "attorney," "coal," "have," "medical," nurse," "mixture," "or," and "try."[42] But the justices use a dictionary for this purpose with increasing frequency.

In a series of three cases,[43] the Supreme Court cited five different dictionaries, a variety of works of popular fiction, newspaper articles, and even the Bible to support their varying views of the definition of "to use" and "to carry" in relation to a sentencing

34. *Id.* at 416.

35. *Id.*

36. *Id.*

37. *Id.* at 415. These include multiple opinions for single cases. The number came from adding up Hoffman's original counts for individual Justices.

38. *See* Verizon Communications, Inc. v. FCC, 535 U.S. 467, 500–01 (2002) (defining "cost" in a specialized accounting sense with economic and accounting dictionaries).

39. Hoffman, *supra* note 21, at 416. *See* Utah v. Evans, 536 U.S. 452, 475 (2002) (defining "enumeration" with reference to dictionaries in use during the late eighteenth century).

40. *See* Sonpal, *supra* note 12, at 2177–80 (arguing that old dictionary definitions do not necessarily encompass actual usage and, therefore, do not support the textualist justification for using dictionaries in the first place).

41. *See infra* Part II.A.2. *See also* Hoffman, *supra* note 21, at 406–07; Sonpal, *supra* note 12, at 2211–15; Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275 (1998).

42. Hasko, *supra* note 22, at 429–37.

43. Muscarello v. United States, 524 U.S. 125 (1998); Bailey v. United States, 516 U.S. 137 (1995); Smith v. United States, 508 U.S. 223 (1993).

enhancement for a drug related offense. The statute in question reads, in relevant part: "Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm" is subject to additional penalties.[44] This seemingly straightforward sentencing enhancement yielded a myriad of challenges due to the many creative ways criminals "use" and "carry" firearms during drug deals.

The first case to challenge the ambiguity of the "use" provision was *Smith v. United States*.[45] John Angus Smith attempted to trade a MAC-10 automatic weapon for three grams of cocaine. Unfortunately for Smith, the purchaser was an undercover narcotics officer. The problem presented to the Court was whether Smith's "use" of the firearm during the transaction fit with the statute's intentions. The majority argued that while at first glance one might define "to use" as "to use as a weapon," that did not "preclude us from recognizing that there are other 'uses' that qualify as well."[46] The Court used *Webster's New International Dictionary* to verify a definition of "to use" as "to convert to one's service" or "to employ."[47] The interpretative question then became whether "active employment" encompassed trading a gun for drugs.[48] The majority concluded that it is reasonable to interpret "to use"—under the chosen definition—to include bartering.[49] In short, the majority used the dictionary to verify their linguistic intuitions that "to use" *could* have the usage they were trying to attach to it.

C. Defense of the Practice

Of course, dictionary use has some logically defensible basis in a new textualist statutory analysis. First, new textualists make convincing arguments in their rejection of legislative history as an accurate and judicially restraining method of interpretation. Among the various criticisms, new textualists have argued that legislative history purports to show a collective intent of the legislature when nothing that simple could possibly exist among

44. 18 U.S.C. § 924(c)(1) (1986), *amended by* 18 U.S.C. § 924(c)(1) (2000).
45. *Smith*, 508 U.S. 223.
46. *Id.* at 230.
47. *Id.* at 229.
48. *Id.*
49. *Id.* at 236–37.

535 opinionated men and women.[50] Justice Scalia notes that the unfortunate by-product of judicial reliance on legislative history is that it becomes increasingly less trustworthy as a source of actual intentions the more it is used since legislators will use the record to insert "intentions" that were not meant to be in the statute.[51]

Lacking legislative documentation besides the statute, resorting to the dictionary seems like a reasonable step in construing ambiguous words within a statute. One reason textualists have not presented a fully articulated defense of dictionaries might be that it is assumed none is necessary since dictionaries are universally accepted as objective.[52] However, serious criticisms of dictionary use call this assumption into question.

II. CRITICISMS OF DICTIONARY USE

In an oft-quoted passage, Judge Learned Hand, arguing for imaginative reconstruction of intentions, said: "[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."[53] Essentially, without going through the linguistic machinations found below, Judge Hand recognized that dictionaries give one little insight without the contextual reference of a statute's purpose.

Criticisms of dictionary use have fallen into two basic categories. The first is that judges have devised no consistent method for evaluating which dictionaries are appropriate choices for various situations. The second line of criticism is more fundamental to the nature of dictionaries. Dictionaries define words acontextually and are not appropriate guides to the actual usage of words within phrases and sentences. This second line has broken down into two subcategories: 1) criticisms of the Definition Method for old statutes with old dictionaries; and 2) criticisms of the Verification Method with contemporary dictionaries.

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50. *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 675 (1997).

51. SCALIA, *supra* note 5, at 34.

52. *See* Sonpal, *supra* note 12, at 2197.

53. Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945), *aff'd*, 326 U.S. 404 (1945).

A. Dictionary Choice

Besides listing every word ever defined by the Court, Samuel Thumma and Jeffrey Kirchmeier calculated that approximately 120 different dictionaries were cited through the 1997–98 term of the Supreme Court.[54] Among general usage dictionaries, *Webster's Third International Dictionary* led the pack, appearing in 102 opinions, with *Webster's Second International* appearing in eighty-eight, and the venerable *Oxford English Dictionary* in forty-six.[55] Despite the huge number of dictionaries from which to choose, and their usually dispositive impact on a case, judges offer little explanation or methodology for their choices.[56]

1. Specialized vs. General—Before choosing the dictionary edition, the Court must first decide if a general dictionary or a specialized (usually law) dictionary is more appropriate.[57] For specialized dictionaries, the most frequently used have been various editions of *Black's Law Dictionary* (107 times) and *Bouvier's Law Dictionary* (thirty-six times).[58] Justices rarely use other law dictionaries.[59]

It is generally a judgment call whether a certain word or phrase was used as a legal term of art or in a general use context. While different rules exist for contract interpretation,[60] judges must rely on their intuitions, which occasionally differ, for statutory interpretation. This represents more than mere procedural preference as the decision between specialized and ordinary can be dispositive in a decision.[61] For example, in *Sullivan v. Stroop* the Court looked at an Aid to Families with Dependent Children (AFDC) provision that allowed the Department of Health and Human Services to ignore the first fifty dollars a family received each month in "child support" when calculating benefits.[62] Plaintiffs argued that "child support" should be defined as all payments supporting children,

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54. Thumma & Kirchmeier, *supra* note 15, at 262.

55. *Id.* at 262–63.

56. *Id.* at 272. *See also* Thumma & Kirchmeier, *supra* note 22, at 53–54 (listing recent cases in which the Court used various dictionaries to come to disparate conclusions).

57. *See* Sonpal, *supra* note 12, at 2198.

58. Thumma & Kirchmeier, *supra* note 15, at 263.

59. *Id.*

60. *See, e.g.*, Mark L. Movsesian, *Are Statutes Really "Legislative Bargains"? The Failure of Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145 (1998).

61. *See, e.g.*, Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't. of Health & Human Res., 532 U.S. 598, 603 (2001) (noting the term "prevailing party" was a legal term of art).

62. Sullivan v. Stroop, 496 U.S. 478 (1990).

including their Social Security payments.[63] The majority cited *Black's Law Dictionary* and other statutory provisions to determine that "child support" was a legal term of art limited to court-ordered payments.[64] However, Justice Stevens' dissent argued that "child support" was clearly an ordinary meaning term, unlimited by legal definitions.[65]

The problem is not that judges must choose between the two—this is a role (and skill) textualists or intentionalists would agree a judge is capable of fulfilling. The issue in the first level of dictionary choice is demonstrated in *Sullivan*, where the majority merely stated that "child support" is a term of art and then worked logically from that point.[66] The dissent, on the other hand, said Social Security clearly "supports a child" and worked logically from that point.[67] Neither side felt the need to justify the original dichotomy, resulting in a lack of consistency. As discussed in Part III, this deductive logic amounts to a formalist sham, with later arguments merely acting as a smoke screen, diverting attention from the unjustified rule originally deduced.

2. Types of General Dictionaries—Without delving too deeply into the history of lexicography,[68] there has long been a split between the descriptive and prescriptive methods of dictionary writing.[69] The earliest dictionaries were written by elites who wished to convey the correct usage of phrases and terms. Most notably, Dr. Samuel Johnson wrote one of the first English dictionaries with the goal of "fixing" certain problems in the language.[70] As such, many lexicographers believed that prescriptive dictionaries failed to reflect many of the "plain meanings" of words used, and instead reflected the authors' elite, hyper-educated view of the way words should be used. In fact, to many of these lexicographers, "actual usage [was] evidence of the deterioration of the language."[71] This

63. *Id.* at 482.

64. *Id.* at 482–83.

65. *Id.* at 496.

66. *Id.* at 483.

67. *Id.* at 496.

68. *See* Sonpal, *supra* note 12, at 2180–91. Sonpal gives a detailed history of dictionaries from the first known English Dictionary written by Samuel Johnson up to today's Webster's Third New English Dictionary. *See generally* SIDNEY I. LANDAU, DICTIONARIES: THE ART AND CRAFT OF LEXICOGRAPHY (1984).

69. Sonpal, *supra* note 12, at 2187–88.

70. *See* LANDAU, *supra* note 68, at 51. Samuel Johnson originally wrote *The Plan For a Dictionary of the English Language*, which included even broader goals of correcting the way language was spoken. Later he accepted the realities and importance of considering actual usage while still abhorring the deterioration of language. *Id.*

71. Sonpal, *supra* note 12, at 2183. *See also* LANDAU, *supra* note 68.

type of linguistic elitism calls into question the trustworthiness of such dictionaries as true reflections of ordinary usage.

Additionally, the distinguished lexicographer Sidney Landau writes that "prescription is impossible to distinguish from bias."[72] When a lexicographer attempts to write a prescriptive dictionary, it is impossible for the politics and biases of the writer not to creep in as decisions on usage are made according to the education and background of the writer.[73] Linguist and lawyer Laurence Solan says of such lexicographical biases, "[w]e commonly ignore the fact that someone sat there and wrote the dictionary which is on our desk, and we speak as though there were only one dictionary, whose lexicographer got all the definitions 'right' in some sense that defies analysis."[74] Of course, unlike legislative history, no one can accuse the lexicographer of inserting bias to effect possible future statutory interpretation. But the lexicographer's bias can destroy the idea that a dictionary provides an ordinary usage. To idealize these prescriptive dictionary definitions is the first step in a faulty, formalist method of defining ambiguous terms.

In the late 1800's a movement grew in England for the lexicographer to act more as a historian than a critic.[75] The theory called upon the lexicographer to record all the ways in which words were used instead of merely the ways in which he wanted them to be used.[76] This theory eventually manifested itself in the *Oxford English Dictionary* and later the *Webster's New English Dictionary, Third Edition.*[77] Some hailed these dictionaries as a step forward in lexicography, while others—including Justice Scalia—derided such dictionaries for "casting the mantle of its approval over . . . corrupted English."[78] Despite Justice Scalia's criticism, the descriptive dictionary seems a better choice in finding ordinary usage, but descriptive dictionaries have problems as well.

Landau describes the process of writing a dictionary as one of unacknowledged plagiarism. While in the past it was accepted that dictionaries would copy from each other full entries and even

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72. LANDAU, *supra* note 69, at 32.

73. *Id.*

74. Solan, *supra* note 19, at 50. Landau says of this tendency, "Although some readers may take all dictionary data as if they were authoritative guides on how to spell, pronounce, or interpret meaning, they are not . . . so intended." Landau, *supra* note 68, at 217.

75. Sonpal, *supra* note 12, at 2186–87.

76. *Id.* at 2187.

77. *Id.*

78. *Id.* at 2188 (quoting *The Death of Meaning*, THE TORONTO GLOBE & MAIL (Sept. 8, 1961)).

pages, it is now thought that dictionaries should be "new."[79] Landau acknowledges that someone who attempted to write a new dictionary would inevitably write a dictionary filled with holes, mistakes, and overlooked meanings.[80] Moreover, this process of copying results in slow-moving progress as dictionaries are written and rewritten. It takes years before dictionaries catch up with actual usage of a word.[81] Turning to a dictionary written contemporaneously to a statute may not reveal the ordinary usage of the day and age, either because of the lexicographer's preferences or the mere inability of the dictionary to adapt.

Since the textualist approach tries to discern the plain meaning of the statute, it follows that reliance on a prescriptive instead of a descriptive dictionary will not achieve that goal. Nor will reliance on an older contemporaneous dictionary. Justices rarely defend their choice of general dictionary,[82] and even more rarely discuss the lexicographic method's consistency with their interpretive reasoning.[83]

For instance, in *MCI Telecommunications v. American Telephone and Telegraph Co.*,[84] the Court evaluated the breadth of the word "modify." Under the statute in question, communication common carriers were required to file tariffs with the Federal Communications Commission (FCC).[85] The FCC was authorized to "modify any requirement made by or under . . . this section . . . ."[86] The FCC, under their power to modify, made tariff filing optional instead of required. The Court evaluated whether "modify" had a broad enough definition to encompass so drastic a change.

The majority stated broadly that the definition does not reach that far, writing: "Virtually every dictionary we are aware of says that 'to modify' means to change moderately or in minor fashion."[87] The petitioner argued that the *Webster's Third New International Dictionary* defined "modify" as "to make a basic or important change

79. LANDAU, *supra* note 69, at 170–73, 228.

80. *Id.* at 173.

81. Aprill, *supra* note 41, at 288 (tracing the failure of dictionaries to come near capturing today's definition of computer).

82. *Id.* Aprill describes the ways in which Judges choose dictionaries to find definitions best suited for the interpretative choices they were already making—in other words, as conclusive justification instead of interpretive starting points. *Id.* at 281, 327–28.

83. *See, e.g., id.* at 329.

84. 512 U.S. 218 (1994).

85. 47 U.S.C. § 203(a) (2000).

86. *Id.* at § 203(b)(2).

87. 512 U.S. at 225.

in."[88] Accordingly, the statute was vague and therefore *Chevron* deference[89] should have been invoked.

But the Court rejected *Webster's Third* in saying that all dictionaries published at the time of the statute held the more narrow definition. A legislator might have been using "modify" with a meaning that had not yet reached the slow-moving dictionary. Indeed, Sidney Landau might argue it is the natural result that the dictionaries all have similar definitions, both old and new. He might argue that it is the logical result that the old and new dictionaries have similar definitions—dictionaries are constructed by copying predecessors, so they share a common lineage.[90] In other words, dictionaries written at the time of the statute might never have attempted to capture the ordinary usage because they were borrowing from prior dictionaries.

The Court goes on to explain in a far shorter section that the tariff filing portion of the statute was "the heart of the common-carrier section of the Communications Act."[91] In other words, by basically eliminating the provision, the FCC made a far broader change than the "modify" provision contemplated.

The dissent argued that even if they accepted the majority's definition of "to modify," they could not agree that the de-tarrifing policy was any sort of major or "cataclysmic" policy shift.[92] The point of this Note is not to decide if de-tarrifing is a major or minor shift. That is exactly what the Court should be deciding. The Court should not be arguing, however, which dictionary definition of "modify" is more appropriate. As will be explained further, linguistic intuitions are quite clear that "to modify" exists as a marginal categorization within "to change." To attempt to place an exact meaning is futile and fallacious. Any answer will be self-serving by definition because, as Landau points out, it will involve biased decision-making as the court becomes a lexicographer.

Indeed, one could imagine future additions of *Black's Law Dictionary* or the *Oxford English Dictionary* reflecting the Court's lexicographical work, making the Court's use of a dictionary an

88. *Id.* at 225–26.

89. *See* Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 387 (1984) (holding that deference should be given to agency interpretations that a statute can reasonably bear); *see also* Merrill, *supra* note 9, at 353–54 (arguing that textualism allows the Court to be an "anonymous interpreter" thereby rendering *Chevron* deference inapplicable).

90. Landau, *supra* note 68, at 228 ("All commercial dictionaries are based to some extent on preexisting works.").

91. 512 U.S. at 229.

92. *Id.* at 241 (Stevens, J., dissenting).

almost circular logic devoid of the judicial restraint so vaunted by the new textualists.

B. Dictionaries as a Violation of the Non-Delegation Doctrine

Textualists argue that by giving weight to legislative history, there is an inherent approval of lawmaking which never passed through the constitutional process of bicameralism and presentment.[93] Textualists accept particular forms of extrinsic contextual information beyond the "four corners" of a statute, such as secession to the interpretations and delegations of power to executive agencies; judicial decisions; legal treatises; and dictionaries.[94] However, power has been officially delegated either by the Constitution or by the legislature to both the precedence of judicial opinions and the interpretations of executive agencies. Excluding legal treatises for the purpose of this Note, dictionaries are a glaring piece of extrinsic evidence that has neither passed through bicameralism and presentment nor been delegated by a legislative authority.

Manning explains that "textualists often rely on extrinsic sources, such as judicial decisions and legal treatises . . . that have not undergone the legitimating process of bicameralism and presentment."[95] A textualist might argue that the use of legislative history is more egregious than the use of other extrinsic sources because it puts in the hands of Congress both the ability to write the statute *and* to interpret it.[96]

Solan points out that dictionaries are merely written by a person making judgments and decisions.[97] They are not infallible or constitutionally empowered sources. Recall that the *Smith* Court replaced the phrase "to use" with the definition "to actively employ."[98] Congress, of course, did not say "to actively employ." Congress said "to use." Yet the Court evaluates the statute within the framework of the second phrase. As will be shown below, the second phrase, unlike "to use," does not have a specialized meaning when combined with the word "firearm."[99] This allowed the Court, through extrinsic evidence, to redefine the statute in an in-

93. *See* Manning, *supra* note 50, at 675.
94. *Id.* at 695–97.
95. *Id.* at 695.
96. *Id.* at 675.
97. Solan, *supra* note 19, at 50.
98. Smith v. United States, 508 U.S. 223, 229 (1993).
99. Hoffman, *supra* note 21, at 465.

tuitively dissatisfying manner. The Court was more comfortable with the definition written by some other person then they were with the legislators who were democratically elected to write the statute. It is logically inconsistent to use as dispositive one piece of non-delegated contextual evidence and to ignore another on the same grounds. As will be shown below, neither piece of extrinsic evidence was necessary.[100]

C. Dictionaries are Acontextual

In a harsh dissent in *Smith*, Justice Scalia argued that "the Court does not appear to grasp the distinction between how a word *can* be used and how it *ordinarily is* used."[101] Scalia's dissent in *Smith* makes a strong point that words cannot be defined independently of their context. Scalia wields the same *New Webster's International Dictionary*, but instead of using it as a conclusory definition, he uses the example phrases to show that reasonable interpretations can vary widely.[102] Through analogy, Scalia points out the many applications of the word "use" but notes that each relies on the context of the application. For instance, if one asks, "do you use a cane?" the natural implication is that the cane is being used to assist in walking, not as a wall decoration.[103] Scalia notes that the statute does not refer to using a gun to scratch one's head, but rather as a weapon to either intimidate or to shoot.[104]

It is obvious that had Smith given money for cocaine instead of a MAC-10, one could say "Smith used money to buy cocaine." However, applying this expansive meaning of "to use" in "use a firearm" feels intuitively incorrect. The natural intuition is that the phrase "use a firearm" is meant to encompass more than the mere presence

100. Legal treatises seem equally problematic in this respect. *Cf.* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2101 (2002) (discussing constitutionality of invoking pre-enactment legislative history and post-enactment legislative history to resolve ambiguities in a statute).

101. 508 U.S. at 242 (Scalia, J., dissenting).

102. *Id.* (Scalia, J. dissenting). *See* Note, *Looking It Up*, 107 HARV. L. REV. 1437 (1994). The author contends that dictionaries, instead of being a starting point for interpretation of definitions, are too often used as a conclusory point. *Id.* at 1452.

103. *Smith*, 508 U.S. at 243.

104. *Id.* In answer to this, the majority charged that Scalia's interpretation would apply to someone who shot the gun, but not to someone who used it to bludgeon as that is not the normal use. Notwithstanding the "carry" section, this criticism fails to take into account that someone using a gun to bludgeon could still be using the gun "as a weapon." *Smith*, 508 U.S. at 232.

of a firearm. Some of the criticisms of Dictionary Method as well as a short discussion of analogical reasoning may help to explain these intuitions.

D. Linguistic Criticisms

1. Context—The Fuzziness of Categorization—In Chapman v. United States,[105] the Supreme Court dealt with one of many instances[106] where the mandatory minimum sentence for the distribution of LSD diverged from the Court's sense of fair sentencing due to confusion between the statute's guidelines and the method by which LSD is actually distributed. The statute assigned a minimum sentence of five years for the distribution of more than one gram of a "mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD)."[107] Richard Chapman sold LSD absorbed onto blotter paper, with a total weight of 5.7 grams.[108] LSD obviously weighs far less than blotter paper, and the question was whether Congress really meant to hinge the punishment on the weight of the conveyance rather than the amount of drugs. Stretching this interpretation to absurdity is relatively easy: Judge Posner analogized the definition of "mixture" to punishing a marijuana smoker based on the weight of his pipe.[109]

Laurence Solan used *Chapman* to show that definitions are merely attempts at usage categorization.[110] A definition must be broad enough to capture all possible meanings, yet narrow enough to retain utility. The margins of these categories are then, by nature, "fuzzy."[111]

The classic linguistic example is that if one were asked "Is chess a game?" the answer would unquestionably be "yes."[112] But, defining "game" is not so easily done. One might say, "an activity with a board where pieces can be moved according to rules, with a goal of winning." But this is too narrow. One might say a "competition among two or more people." But this is too broad. Dictionaries can

105. 500 U.S. 453 (1991).

106. *See* United States v. Larsen, 904 F.2d 562 (10th Cir. 1990); United States v. Healy, 729 F. Supp. 140 (D.D.C. 1990); United States v. Marshall, 706 F. Supp. 650 (C.D. Ill. 1989).

107. 21 U.S.C. § 841(b)(1)(B)(v) (2000).

108. *Chapman*, 500 U.S. at 456.

109. United States v. Marshall, 908 F.2d 1312, 1332 (7th Cir. 1990) (Posner, J., dissenting).

110. Solan, *supra* note 19, at 50.

111. *Id.* at 52.

112. *Id.* at 53.

only attempt to find the margins of the categories. Intuitions as to what must fit inside a category become fuzzier at the margins of that category.[113]

In writing dictionaries, lexicographers do no more than determine the borders of a word as a category based on the word's usage in the past.[114] Since the Court's verification uses are frequently done at the margins—such as "mixture" or "use"—the dictionary as an organic tool sheds little light.

2. *Context—Specialized Meanings*—Craig Hoffman explains that words have specialized meaning based on context—verbs are defined by the nouns they modify.[115] For instance, one might say, "John uses and carries a gun, Mary a box." While "uses and carries" has a special contextual meaning with gun, there is none with box. Instinctually, we understand John's use is such that the gun is a weapon, Mary's use of her box is ambiguous because "box" and "use" have no specialized meaning.[116]

Hoffman concludes with an analysis even more limiting than Scalia's in saying that not only is "use as a weapon" the ordinary or likely meaning, it is the only meaning one can draw because of the contextual nature of the phrase "use a firearm" and the necessary association of the specialized meaning.[117] Hoffman urges judges to shy from dictionaries because they blunt the intuitions about the proper usage of a word within a phrase.[118] The method suggested below borrows very much from Hoffman's idea of linguistic intuitions. But Hoffman's idea of intuitions and "sentence parsing" leaves too much up to semantics and would allow clever judges to mask biases. This Note's method suggests a form fitting within the

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113. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 66–71 (G.E.M. Anscombe trans., Blackwell Publishers Ltd. 2d ed. 1958).

114. Solan, *supra* note 19, at 53.

115. Hoffman, *supra* note 21, at 431–36 (explaining the various constraints of "physical reduction"). *See also* Clark D. Cunningham & Charles J. Fillmore, *Using Common Sense: A Linguistic Perspective on Judicial Interpretations of "Use a Firearm,"* 73 WASH. U. L.Q. 1159, 1176 (1995). Hoffman's article is, in essence, a linguistic exercise in demonstrating that sentences can only be read in certain ways because sentence structure dictates to a large extent which words control as dominant and subservient to understanding. It is not necessary to understand the particulars of the sentence diagrams to understand that all linguistic rules (not pragmatics, but linguistic philosophy) are based on an attempt to describe intuition rather than to prescribe how people should write or talk. Cunningham and Fillmore go through virtually the same linguistic overtures as Hoffman and come to a similar conclusion that linguistics should discern ordinary meaning. *Id.* at 1203. *See generally*, ROBERT LORD, WORDS: A HERMENEUTICAL APPROACH TO THE STUDY OF LANGUAGE 64 (1996).

116. Hoffman, *supra* note 21, at 433.

117. *Id.* at 435.

118. *Id.* at 437.

classic boundaries of legal reasoning rather than linguistics to express such intuitions and force judicial "intuitions" to include purposive arguments to encourage transparency.

III. A NEW METHOD—LINGUISTICS AND ANALOGY

Laurence Solan notes that jurists like Benjamin Cardozo have long yearned for a code of laws "at once so flexible and so minute, as to supply in advance for every conceivable situation the just and fitting rule."[119] Solan explains that while this may not exist in law, it does in our understanding of language. "That 'code' is what linguists call a generative grammar, the set of internalized rules and principles that permit us, unselfconsciously, to speak and understand language with ease and with great rapidity."[120] This "code" is based in our intuitions about language—Hoffman's specialized definitions, for instance. These intuitions are not helped but actually blunted by the use of the dictionary.[121]

A. Linguistic Philosophy

The philosopher Ludwig Wittgenstein gives an example of how learning takes place over time: You are teaching a worker who knows nothing to understand what a slab is, and how to bring it to you. By pointing at the five slabs and saying "five slabs" you could be either explaining that what you are pointing at is five slabs or commanding him to bring you the five slabs. The know-nothing may not understand which is which, but by using our intuitive understanding of language and context we could easily discern your

119. LAWRENCE SOLAN, THE LANGUAGE OF JUDGES 13 (1993) (quoting B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 143 (1921)). *See also* Fiss, *supra* note 14, at 745. Interestingly, Fiss draws the same analogy between the rules of language and the rules of law. But while Solan finds them different, Fiss sees the rules of law as equally flexible. Objectivity exists in the process of interpretation. This sort of 'process theory' objectivity, in law and language, does not mean there is one right answer, but one right way to go about getting an answer that the community evaluating the interpretation will find sufficiently satisfying. The analogical method proposed herein encompasses both Fiss's acceptable process and Solan's intuition concerns.

120. Fiss, *supra* note 14, at 745.

121. Hoffman, *supra* note 21, at 437.

intended meaning.[122] Wittgenstein's point is both the necessity of the context and the idea that without context and experience, words have no intrinsic meaning. The worker who knows nothing has no triggered, subconscious understanding without first learning one over time.[123]

It is fallacious for a judge to pretend as if they are unaware of the meaning and usage of words such as "use" and "modify" before looking those words up in the dictionary.[124] This is because these words have been learned over the course of inheriting language and contain no necessity to define exactly. The definition cannot possibly include everything that the word might or might not connote.

In determining the correct interpretation of the phrase "five slabs," no dictionary is necessary to discern the answer. In fact, no dictionary can answer the question. It is the job of the judge to say "five slabs" was in answer to the question of "how many slabs?" and therefore means five slabs exist.[125]

B. "Reading"—A Wittgenstein-esque Word Game

Below is a word game to demonstrate by analogy the various items in the "contextual toolbox" and the effectiveness of each, ending with an explication of a more limiting method by shrinking the contextual toolbox.

As children, many Jews learn to read Hebrew while in religious school in preparation for a Bar Mitzvah—coming of age—ceremony. This reading of the Hebrew language usually includes no understanding of the words being read, it is merely an ability to understand the symbols and translate them into pronounceable words.[126] Now, imagine a law professor gave the assignment: "Read

122. WITTGENSTEIN, *supra* note 113, at § 21; *see also* SOLAN, *supra* note 119, at 26 ("[O]ur knowledge of language, in the Chomskian sense, is contingent only on our biology and on our having had adequate experience in childhood to acquire the language.").

123. WITTGENSTEIN, *supra* note 113, at §§ 22–34 (describing the process of learning).

124. *See* LORD, *supra* note 115, at 134 ("Anyone claiming not to know the use of the words *red* and *pain* cannot be said to have mastered English.").

125. Hoffman, *supra* note 21, at 429. Hoffman offers a linguistic method whereby a judge should "parse" the sentence to determine the meaning of an ambiguous word within the context of a phrase. This Note, however, recommends a methodology whereby the judge would determine the context of the statute before directly applying any phrasal interpretation.

126. *See* WITTGENSTEIN, *supra* note 113, at § 157. Wittgenstein uses the reading example to illustrate the process of how we learn to translate those symbols into words with understood

Scalia's dissent in *Smith* tonight." Would we say the student fulfilled the assignment if their reading consisted merely of reading and pronouncing each set of symbols without understanding the words? Of course not. Using our various interpretive methods though, one *could* come to a conclusion where the student has fulfilled the assignment simply by reciting without understanding. However, using a method that encompasses context, one would be restrained to an interpretation of reading *and* understanding.[127]

For instance, the first definition of read is "to examine and grasp the meaning of."[128] The second definition is "to utter or render aloud."[129] Clearly, both are common usages of "to read." This markedly demonstrates that it is useless to define "to read" out of the context of the phrase in question. Were we to choose a definition here, it would only be based on the biases of the interpreter—the frustrated teacher will choose the first, the lazy student the second. This leaves one no closer to a constraining interpretive method.

Perhaps the professor mumbled something afterwards about how students never understand Scalia. This would be akin to legislative history. She might be referring to her expectations of what she meant in the assignment or she might be speaking in general, and not referring specifically to the assignment. It might be impossible to tell from merely hearing the aside. Besides, it would be fair for the student to say that the assignment must stand on its own. He can only be expected to understand what he was given, no more. It would be unfair to say that her intentions in her mumble were part of the assignment.

One could look at the context of the words together to try determining which meaning fits best in the context of the entire sentence. This might be a more intuitively limiting method than a mere dictionary definition. "Read Scalia's dissent in *Smith* tonight" would *most likely* mean that reading and understanding was expected. It seems that it would be useless or absurd for it to be read any other way. But, this would not prove absolutely—only likely—that the assignment was more than to merely read.

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meanings. While the analogy here is facially similar to his example, it differs significantly in substance.

127. *See* Lawrence Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235, 254 (1997). Solan uses a facially different but substantively similar example involving two men drinking in a bar discussing their families. One asks the other, "Are you going to have another one?" Solan points out this can mean babies or drinks; context is the only way to know the correct answer and there is only one correct answer. *Id.*

128. WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 2071 (2d ed. 1942).

129. *Id.*

C. Analogical Reasoning

In his seminal work, Edward Levi attempted to explain the workings of legal thought through analogical reasoning.[130] Since that time, vast and complex theories have attempted to describe the true machinations behind the facially simplistic form.[131] This Note will briefly describe three of the more recent writings on analogical reasoning. Two authors rely on philosophy to varying degrees—Scott Brewer and Cass Sunstein—and one, Dan Hunter, describes modern discoveries in the cognitive science of analogical reasoning. For the purposes of this Note, it is not necessary to fully explicate the competing views. Rather it is helpful to see where the major similarities, if applied to defining ambiguous statutory terms, would yield more transparent decisions holding more of what Brewer terms "rational force."[132]

In short, analogical reasoning is a process of predicting certain outcomes for ambiguous situations by making comparisons to known outcomes in known situations.[133] The known situation is sometimes called a "source" and the unknown is the "target."[134] For example, in the word game above, analogical reasoning was used to decide if "to read" (the target) was more like learning a foreign scripture (Source 1) or understanding a known language (Source 2). Note that to reach the conclusion that reading meant understanding, a series of assumptions were made drawing relevant similarities to previous situations (reading means understanding *because* this is a law school, all law school classes expect understanding, etc.).[135] Drawing the series of relevancies is where the fight lies as to the quality of analogical reasoning. Some argue that there is

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130. *See* EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING 1–2 (1947); Sunstein, *supra* note 13, at 742. *Cf.* Larry Alexander, *Bad Beginnings*, 145 U. PA. L. REV. 57 (1996) (arguing that all analogical reasoning is actually deductive reasoning or moral reasoning).

131. For a sample of the most recent influential theories, *see* Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 925 (1996); Dan Hunter, *Reason is Too Large: Analogy and Precedent in Law*, 50 EMORY L.J. 1197 (2001); F.M. Kamm, *Response: Theory and Analogy in Law*, 29 ARIZ. ST. L.J. 405 (1997); Levi, *supra* note 130; Frederic Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987); Sunstein, *supra* note 13.

132. Brewer, *supra* note 131, at 928.

133. *See* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 65 (1996) (summarizing analogical reasoning in its "characteristic form"); Brewer, *supra* note 131, at 955 (presenting a logical breakdown of analogy).

134. KEITH J. HOLYOAK & PAUL THAGARD, MENTAL LEAPS: ANALOGY IN CREATIVE THOUGHT 2 (1995).

135. SUNSTEIN, *supra* note 133, at 67.

an inescapably deductivist element—meaning a rule is formed saying that Quality A (law school) always means Quality X (understanding).[136] Others argue that there is at least some form of "discovery" or intuitive knowledge that guides one to the correct analogy.[137] Kamm says of this moment:

> While we may need a theory to *explain* why case A is really more like case B than case C, we may still, without deep theoretical justification, see that case A is more like B than C . . . . This does not (or should not) necessarily lead one to reject the conclusion.[138]

This "discovery" moment is usually compared to stories of scientists who come up with a theory, virtually out of thin air, and only later find the theory correct through scientific inquiry.[139]

1. Dan Hunter and Multiple Constraint Theory—Dan Hunter attempts to quantify this moment using cognitive psychology. Hunter uses Keith Holyoak and John Thagard's theory of analogy as occurring on a level of "multiple-constraints" where instead of over-arching general principles controlling, the various levels of constraints lead one to the correct analogy.[140] These constraints are essentially: surface-level (a case about a train is like a case about a bus);[141] structural, which involves a higher level of theorizing (cases involving federal interests trumping state's interests);[142] and purposive, which involves the highest theorizing and the furthest abstraction from facts (cases involving over-arching theories of justice). Hunter's description of cognitive psychology is important for defining words because it confirms the linguist's idea of a definition that feels right in context based on surface and purposive levels of similarity.[143] Hunter also becomes relevant in putting forth a new model of defining ambiguous terms as he anticipates the use of cognitive psychology in statutory interpretation.[144] Hunter thinks

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136. Brewer, *supra* note 131, at 965.

137. *See* Hunter, *supra* note 131, at 1244; Kamm, *supra* note 131, at 413–14.

138. Kamm, *supra* note 131, at 414; *see also* SUNSTEIN, *supra* note 133, at 65 (arguing against analogical reasoning as a form of deduction).

139. *See* Brewer, *supra* note 131, at 954 n.94 (citing a Nobel Prize-winning scientist's revelation about DNA production while driving on a deserted highway in California).

140. Hunter, *supra* note 131, at 1215.

141. *Id.* at 1220.

142. *Id.* at 1221.

143. *Id.* at 1245 ("There exists a temporally prior process of 'discovery' where we see that case A is similar to case B, without any analysis of whether this similarity can be used to justify the outcome of case B.").

144. *Id.* at 1236.

that analogy when applied to statutory law will not frequently work on the surface-level or structural mapping.[145] Instead, a jurist will be forced to look at purposive elements of statutes to decide how to rightly define ambiguous terms to meet some over-arching theory.[146]

2. Scott Brewer and Analogy Warranting Rules—Brewer relies on the theory of reflective equilibrium to craft a picture of analogy that is a cross between deductive, top-down reasoning and analogical, case-by-case reasoning.[147] Put simply, reflective equilibrium occurs by taking a general principle and applying it to a variety of situations where a desired outcome conforming to a normative worldview is already known.[148] One then compares the principled outcome to the desired, normative outcome.[149] If the principle fails, it is then tweaked to reach the desired outcome.[150] By allowing fluidity in general principle and low-level examples, the two balance until the principle reaches the desired result.

Brewer's analogy theory, or what he calls "exemplary" reasoning, in its simplest state develops an "analogy-warranting rule" or "AWR" to explain the relevancy of a source analogy to a target analogy.[151] Once an "AWR" is developed, it is tested through an "analogy-warranting rationale" or "AWRa."[152] As Brewer notes, this process can devolve into the "infinite regress" paradox, but this problem is dismissed.[153] Brewer's AWR and AWRa provide for a testing and re-testing through a reflective equilibrium that provides a rule to apply in choosing the correct source analogy.[154]

3. Cass Sunstein and Low-Level Principles—Cass Sunstein relies most closely on the revelatory moment of "discovery"[155] and as such

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145. *Id.*

146. *Id.* at 1237 (evaluating the meaning of "unlawful killing" in two abortion statutes).

147. Brewer, *supra* note 131, at 938–39. *Cf.* Richard Posner, *Legal Reasoning From the Top Down and From the Bottom Up*, 59 U. CHI. L. REV. 433 (1992) (proposing the idea that the two types of reasoning never actually meet).

148. Brewer, *supra* note 131, at 938–39; Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1181 (1999). *See generally* JOHN RAWLS, A THEORY OF JUSTICE, 48–51 (1971).

149. Brewer, *supra* note 131, at 938–39.

150. *Id.*

151. *Id.* at 962. *See also* Hunter, *supra* note 131, at 1260 (providing a logical map for Brewer's theory).

152. Brewer, *supra* note 131, at 962.

153. *Id.* at 971. *See generally* I.E. MACKENZIE, INTRODUCTION TO LINGUISTIC PHILOSOPHY, 5 (Catherine Rossbach ed. 1997) ("In attempting to be completely explicit in our expression of a rule, we embark on an infinite regress.").

154. Brewer, *supra* note 131, at 971.

155. Sunstein, *supra* note 13, at 781–83.

is termed by Brewer a "mystic."[156] Sunstein's model of analogy rejects the philosophical idea that analogy is a crude form of reflective equilibrium.[157] Sunstein sees analogical reasoning as a "truncated" reflective equilibrium where a worldview exists but the general principle level is never reached. Only low-level principles attach to the analogous reasoning.[158] In other words, there is no need in Sunstein's analogical reasoning to find principles that reconcile disparate examples. As an example, Sunstein explains that a lawyer may believe "that the constitution does not create a right to welfare, that political speech cannot be regulated without a showing of immediate and certain harm, or that government may impose environmental regulations on private companies."[159] However, lawyers cannot explain these beliefs beyond "incompletely theorized" principles.[160] This lack of over-arching theory, what he calls "low-level principles" or "low-level abstraction" can be seen as a criticism, but in a sense, with statutory definitions, it may be a virtue since the ambiguity may not require consistency within the *corpus juris*.[161]

Sunstein sees semantics in analogical reasoning as formalism, contributing to sham decision-making.[162] Instead, he stresses that analogical reasoning must go beyond semantic formalism to a substantive inquiry, drawing distinctions between examples.[163] Only then can the values injected in decision-making come to light. Brewer sees semantics as only one part of the analogical process and he includes pragmatics in that equation as well.[164] He differentiates the two in that semantics may be the possible definitions of a word, but pragmatics would tell which usage of the word is the most common understanding.[165] While Brewer illustrates the importance of pragmatics and semantics in interpretative theory, Sunstein's point still stands—pragmatics can be a type of formalism.[166]

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156. Brewer, *supra* note 131, at 954.
157. Sunstein, *supra* note 13, at 743.
158. *Id.* at 753–54.
159. SUNSTEIN, *supra* note 133, at 68.
160. *Id.*
161. *See* Sunstein, *supra* note 13, at 753–54.
162. *Id.* at 755–56.
163. *Id.* at 756–57.
164. Brewer, *supra* note 131, at 987–88.
165. *See id.* Brewer cites the question "can you pass the salt" to show that pragmatics are needed to realize this is a request and not a literal inquiry into one's ability to pass the salt.
166. *See id.* at 995–96. Brewer acknowledges "open-textured" terms can have multiple meanings which would require "multi-step" analogical reasoning.

Rejecting formalism has important implications for defining ambiguous terms through new textualism. The plain or ordinary meaning rule relies on the idea that there is, in fact, an ordinary meaning for a word or a phrase.[167] But, countless examples prove there are instances in which a word or phrase has multiple ordinary meanings. Succumbing to formalism robs the definition process of any "rational force" and leaves no practical restrictions on interpretation.

D. A New Method: Analogical Reasoning with Linguistic Restraints

The dictionary is a failed mechanism to pinpoint exact parameters of words when it is written to do exactly the opposite.[168] Analogy, like metaphor, serves to allow an indirect method of expression.[169] In that vein, ambiguous terms exist because language sometimes fails in providing a direct way to encompass exact meaning.[170] Reasoning by analogy, in a Rorty-ian sense, would allow the filling of gaps by expressing the contemplated meaning in a relevant phrasal context.[171]

Sunstein, Brewer, and Hunter have significant commonalities between their theories of analogical reasoning. All three see some type of reasoning occurring in a mid-level phase of analogical reasoning that allows the interpreter to draw distinctions and commonalities between the "target" and "source" examples with a process of "discovery" followed by justification of some sort.[172] Whether it is Brewer's analogy-warranting rules, Hunter's purposive-constraint level, or Sunstein's low-level connections, there is a quasi-deductive decision following the "mystic" stage of analogical reasoning. As shown in the linguistic discussion above, when placed in context, ambiguous meanings should "feel" right in one sense or another. By placing the linguistic intuitions within the form of analogy, the discovery process can be coupled with the justification

167. *See supra* Part II.A.2.

168. *See supra* Part II.D.

169. *See* HOLYOAK & THAGARD, *supra* note 134, at 8.

170. For a philosopher's viewpoint on metaphor's role in the limits of language, see RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 18 (1989) ("[T]he unparaphrasability of metaphor is just the unsuitability of any such familiar sentence for one's purpose.").

171. *Id.*

172. *See supra* Part III.C.

process to form a linguistically sound and legally justifiable solution.

This new method borrows heavily from Solan and Hoffman's suggestions on understandings of meaning.[173] Solan suggests legislative history as the answer to the context problem. However, he fails to answer the textualist concerns with legislative history, saying simply that textualism requires that we "ignore information that anchors our understanding of the world."[174] These are unjustifiably strong words for an oft-maligned source. Solan also comes to the conclusion that textualists use dictionaries and dictionaries are manipulable, and therefore the method fails.[175] Hoffman's method takes away the dictionary but replaces it only with intuition.[176] This seems unacceptably manipulable and fails to insert any substantive reasoning into the statutory analysis.

Instead, if judges combined the idea of intuitive word understandings and the well-understood process of legal reasoning through analogy, there would be a system acceptable to the legal community and more true to linguistics. Defining ambiguous terms through analogical reasoning would be the superior method to flesh out a judge's extra-legal reasoning through the justification process and therefore provide a more restrictive method of statutory interpretation in the vein of the new textualism. Hard cases will never yield one unassailably correct definition and judges/interpreters will always use some sort of "impermissible" criteria to decide such as personal moral and political beliefs. The analogical method does not purport to arrive at the correct answer but instead would serve to reveal judicial choices by explicating the low-level and general principles used to arrive at such choices while avoiding a "blunting" of linguistic intuitions.

The goal of the new method is two-fold: reach an intuitive, contextual conclusion and present such a conclusion in terms that are substantive and revealing of a judge's biases. The over-arching background is the search for plain meaning, with the recognition that plain meaning should not be found through formalistic conclusions. This eschewing of formalism serves to find a "better" answer from the point of view of the linguist, and a restrictively satisfying answer from the point of view of the textualist.

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173. *See* Hoffman, *supra* note 21, at 412–15; Solan, *supra* note 127, at 271.

174. Solan, *supra* note 127, at 269.

175. *See id.* at 262.

176. Hoffman, *supra* note 21, at 437. Hoffman says the linguistic method solves the ambiguity problem and allows the court to focus on a legal analysis. *Id.* This begs the question though of what a legal analysis would involve if it is not used to solve the linguistic problem.

One might note that an analogical method of definition already exists. Look in almost any dictionary and, beneath each definition, there will be a series of what Landau calls "illustrative quotations."[177] These short phrases can be invented or excerpted from famous works and are, "frequently essential to tell the reader how the definition is actually used in ordinary context."[178] In form and function, these illustrative phrases are extremely similar steps in the method this Note suggests for defining ambiguous terms. They are simply source phrases to be compared with the target phrase being researched. The dictionary researcher can then employ analogical reasoning in deciding which usage is correct for her purposes.

But, simply researching these illustrative phrases in a dictionary is insufficient. Ladislav Zgusta described both the usefulness and limitations of what he called "exemplification":

> [T]hese examples indicate nothing that is not covered by the definition and not everything that is covered by it. The series of these examples is certainly not complete by far. But completeness is out of the reach of the lexicographer, in the majority of such cases: how could he be expected to collect and elicit a complete list of items which can be characterized as beautiful?[179]

The effect of Zgusta's comment on the analogical method is twofold: "exemplification" is an accepted method; the dictionary is an insufficient place to find a proper range of examples. As Solan says, a lexicographer is not infallible.[180] A judge can and should be able to produce source phrases for commonly used words. Once these are produced, the analogical reasoning process should be a familiar one.

E. An Example of Exemplary Definitions

A judge should look to the context of the statutory phrase to determine from among multiple usages, which is *most likely* within

177. LANDAU, *supra* note 68, at 166.

178. *Id.*

179. LADISLAV ZGUSTA, MANUAL OF LEXICOGRAPHY 264 (Academia Publishing House of the Czechoslovak Academy of Sciences, 1971).

180. Solan, *supra* note 19, at 50.

the given phrase. Until this point, there should be very little interpretive work—judges should not disagree if they are being true to their linguistic intuitions. Here, analogies, or illustrative phrases, can be formed to flesh out linguistic intuitions on which possible usages feel correct. In *SR International Business Insurance Co. Ltd. v. World Trade Center Properties LLC*,[181] Federal District Court Judge John Martin, Jr. was asked to decide whether, for purposes of insurance reimbursements, the 9/11 attacks on the World Trade Center consisted of one "occurrence" or two. Perhaps inadvertently, Judge Martin framed the problem in this analogical sense:

> The extent of the liability of the insurance carriers may ultimately depend upon the resolution of the question:
>
> Which of the two following statements best describes what caused the destruction of the World Trade Center on September 11, 2001?
>
> 1) In a single coordinated attack, terrorists flew hijacked planes into the twin towers of the World Trade Center.
>
> 2) At 8:46 A.M. on the morning of September 11th, a hijacked airliner crashed into the North Tower of the World Trade Center, and 16 minutes later a second hijacked plane struck the South Tower.[182]

The opinion is notable for its remarkable similarity to the method of interpretation suggested here. Judge Martin crafts two very concise source analogies, both reasonable interpretations of the ambiguity in question. The contract itself is the target analogy. In insurance contracts such as these, "occurrence" is usually a defined term.[183] But these contracts were merely "binders" prior to the finalization of contract language, hence the ambiguities.[184] Tragedy struck before the contract negotiations were finished, leaving the courts to adjudicate the meaning of the ambiguous term.[185]

Use of this example does not argue that a contract interpretation method should be used for ambiguous statutory

181. 2002 U.S. Dist. LEXIS 9966 (S.D.N.Y. 2002).

182. *Id.* at *6. Please note that this is in the context of a contract and not a statute. Further, the judge was deciding a motion for summary judgment, so he was not forced to resolve, only agree that an ambiguity existed. *Id.*

183. *Id.* at *8.

184. *Id.*

185. *Id.*

terms. It merely shows a vivid example of possible target analogies for an ambiguous source. Were this a statute, a few simple steps would follow the creation of the source analogies to resolve the ambiguity. This is the classic hard case. A judge would attempt to distinguish plain meaning through common sense. One analogy might *feel* better than another. This is the revelatory or mystic part of the process. But in hard cases, where parties have staked out two reasonable interpretations, this initial reaction may only be a guiding background. The justification process should force logical reasoning. This is the exact moment in which a dictionary provides cover and should be eschewed.

This point is worth repeating in a different form. In choosing between analogies, the goal is to formulate a principle that reveals a judge's bias. In *World Trade Center Properties*, Judge Martin ends the opinion by juxtaposing the sympathy for the property owners (and the desire to rebuild quickly) with the importance of fairly adjudicating a disputed contract term.[186] At some point, a judge would have to decide between these competing, low-level principles. This may involve expanding to the statute as a whole to determine the general intent, or the evil the statute might be addressing.[187] A judge should justify the final choice by making an interpretive argument to find some "analogy warranting rule" to justify what may have been pure linguistic intuition. Majorities and dissents can disagree over the larger intent of the statute or "purposive constraint" and then apply the correct contextual definition based on their answer. These are not over-arching rules necessarily but more akin to Sunstein's "low-level" principles.[188] Even if this was a statute, choosing between the developer and the insurer in the above case reflects no overarching theory of justice, but a case-specific principle must be enunciated. The decision must be made on comparing low-level principles, starting with the linguistic context. Any additions to such context must be out in the open to justify the analogy. Brewer might call this the analogy-warranting rule, Hunter might find this a "purposive" constraint. This is more than merely "parsing the sentence"[189] but involves the limitations of what might analogously be considered the common law, the statute and, of course, common sense.

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186. *Id.* at *18.

187. Solan, *supra* note 127, at 271 (quoting CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996)).

188. SUNSTEIN, *supra* note 133, at 67.

189. Hoffman, *supra* note 21, at 436.

The textualist idea of contextual meaning has much intuitive force, but only by explicating all extra-legal reasoning can the process truly become restraining. Inconsistent judgments cannot be masked in the parsing of a sentence or the semantics of a dictionary choice. A judge's reading of a law's plain meaning would have to stand naked to the world, able to withstand intuition and reason.

Of course, one must note that definition through analogy frequently occurs.[190] However, more frequently than not this analogical reasoning is conclusive rather than investigative. As Sunstein says, "[s]purious classification, or bad formalism, often masquerades as analogical reasoning."[191] In complex questions, an example used as a deduction, "masquerading" as analogy, should not be confused as the methodology suggested here.[192]

IV. FISS AND THE EFFICACY OF PROCESS RESTRAINTS ON JUDGES

If we accept the analogical method, then a judge is confronted with a lack of a citable source on which to stand his opinion. Owen Fiss contends that an objective interpretation of a text—which is what the analogical method would be—does not assume that there is a right or a wrong answer for interpreting a text.[193] However, it does assume that there is a right procedure for interpreting a text and if followed, will yield more restraining results.[194] By this reasoning, a judge properly arguing ambiguous definition through analogy is sufficiently restrained by the process of legal reasoning, despite the absence of citation.

A critic of art or literature has no stand-alone authority.[195] All authority of the critic is derived from the power of the critic's interpretation and its acceptance in the interpretive community.[196] Therefore, the legitimacy of the art critic is based solely on the

190. *See, e.g.*, Chickasaw Nation v. United States, 534 U.S. 84, 91 (2001) (analogizing a list of tax statutes to a list of car brands as proof of a mistaken word usage); Smith v. United States, 508 U.S. 223, 245 (1993) (Scalia, J., dissenting).

191. Sunstein, *supra* note 13, at 756.

192. Scalia's dissent in *Smith* may be a good example of this. There is analogy without reason, rendering analogy essentially formalistic. *See* Smith v. United States, 508 U.S. 223, 243 (1993) (Scalia, J., dissenting). Language itself, essentially formalistic pragmatics, is used to justify Congress's intended meaning rather than a greater purposive element. *Id.*

193. *See* generally Fiss, *supra* note 14.

194. *Id.* at 744–45. As the argument between textualism and intentionalism has shown, the more restraining method is the more desired method. *See* Sonpal, *supra* note 12, at 2180.

195. Fiss, *supra* note 14, at 749.

196. *Id.*

acceptance of his work by his peers. However, because the community is ad hoc built around agreement on interpretation, the community is always shifting and changing as the agreements change. There are essentially no constraints on the interpretive theory—a critical nihilism.[197]

Fiss believes the judge, however, is vested with an authority that exists outside of the strength of his logic—a constitutional grounding of an authority that disregards the "correctness" of his interpretations.[198] The judge does not belong to an amorphous, changing community but rather "an interpretive community . . . by virtue of a commitment to uphold and advance the rule of law itself."[199] So, unlike the nihilist community of artistic interpretation, judges are constrained by the common goals of the community. These standards may change, but it is not the judge's or interpreter's role to change the constraints. Fiss sees these constraints manifesting in internal and external perspectives.[200] Internal perspectives involve the legal community's accepted interpretive method: the "process" of interpretation.[201] The external perspectives involve the layman's acceptance of judicial rulings in terms such as "moral," "political," and "religious."[202]

The analogical method is the hallmark process by which the judge's interpretive community operates.[203] For reliance on intuitive constraints to be sufficiently limiting, it must follow that judges are themselves judged within a community and the approval of that community must be necessary for a judge's legitimacy. To achieve this approval, the analogical method relies on the constraints of this quasi-hermeneutic circle only to the point that it sees a necessary common understanding in the process of applying a chosen context to a particular word or phrase.[204]

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197. *Id.* at 746.

198. *Id.*

199. *Id.*

200. *Id.* at 747.

201. *Id. See also* Andrew E. Taslitz, *Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics*, 32 HARV. J. ON LEGIS. 329, 354 (1995) (arguing for politically realistic interpretive methods).

202. Fiss, *supra* note 14, at 749. *See also* Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 929 (1992). Rubin describes and expands on a Gadamer-inspired theory of legal criticism. He shows that one theory can be rejected as incorrect by an interpretive community yet accepted as a forwarding of legal theory within the confines of the community. Simultaneously, another theory can be rejected and remain outside the acceptance of the interpretive community. *Id.* at 933.

203. *See generally*, LEVI, *supra* note 130.

204. *See* Fiss, *supra* note 14, at 745 ("The bounded or relativistic quality of the interpretive method is suggested by the idea of the hermeneutic circle, which denotes the

The process of choosing between contextually placed analogies falls within already accepted constraints of statutory interpretation.

The method includes the "discovery" moment—the idea that an analogy intuitively feels correct before it can be justified. If accepted within the "process" of interpretation, then its nature as "intuitive" has no less constraining force than *stare decisis* or any other written word or external source. In other words, applying this internal source method wrongly will result in the same illegitimacy as any external source interpretive method. In fact, Fiss writes: "The idea of an objective interpretation does not require that the interpretation be wholly determined by some source external to the judge, but only that it be constrained."[205] The constraints derive from the interpretive community which recognizes the rules of interpretation as authoritative.[206] Apply those rules incorrectly, including linguistic intuitions, and legitimacy will not be granted.

CONCLUSION

The dictionary, while tempting as a tool to discern ordinary usage, is actually less accurate and less constraining than one's developed linguistic intuitions. New textualists should forego the dictionary and eliminate it from their "contextual toolbox." Instead, a judge should compare a word's possible usages and trust linguistic intuitions in the revelatory process of analogical reasoning. Then, the statute's intent and contextual considerations should be used to form a justification among analogies, in place of the dictionary. The justification should be supported by a contextual reading of the phrase, using the intentions of the statute both within itself and placed alongside the *corpus juris*. The arguments between judges should occur in this realm, because it avoids the formalism that dictionaries allow and leads to more openness about biases—hence more restraint on judicial lawmaking. Once the contextual intent is fleshed out, developed linguistic intuitions force limited satisfying interpretations of an ambiguous phrase or word, rendering the dictionary superfluous.

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parameters within which an interpretation achieves its validity and is based on the assumption that, at some point, an interpretation must make an intuitive appeal to common understandings."). *See generally* David Couzens Hoy, *Hermeneutics*, 47 SOC. RES. 649 (1980).

205. Fiss, *supra* note 14, at 744.

206. *Id.*

If accepted within the legal community, this internal source method holds equal, if not greater, constraining force than any external source method, particularly the dictionary.